IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 234

OMAHA PACKING COMPANY,

Petitioner,

vs.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND THE ALTON RAILROAD COMPANY,

Respondents.

BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX.

PAGE

I.

Statement of case 1

II.

The question before this court at this time 4

III.

The Illinois law as to the applicability of the Doctrine of Res Ipsa Loquitur 4

IV.

Petitioner's requested Instruction No. VII was not erroneous in the respects stated by respondents 11

V.

The trial court's duty to correct a defective instruction 16

VI.

Conclusion 17

Appendix A—Grounds for distinguishing cases cited by respondents 19

Table of Authorities Cited.

Cases.

Ardesco Oil Co. v. Gilson, 63 Pa. St. 146 20
Beckwith v. Boynton, 235 Ill. App. 469, 481-483 8
Benedick v. Potts, 58 Md. 52 8
Bollenbach v. Bloomenthal, 341 Ill. 539 ..... 4, 13
Buckland v. N. Y., N. H. & H. R. Co., 181 Mass. 3 10
Chicago & Alton R. R. Co. v. Esten, 178 Ill. 192, 198 13
Chicago & E. I. Railroad Co. v. Reilly, 212 Ill. 506 7
Chicago City Railway Company v. Barker, 209 Ill. 321 . 5, 14
Chicago City Railway Co. v. Carroll, 209 Ill. 318, 324 .. 5
Chicago Union Traction Co. v. Newmiller, 215 Ill. 383 .. 11
Churchill v. Baltimore & Ohio R. Co., 30 F. Supp. 792 .. 10
Delaware, etc. R. Co. v. Converse, 139 U. S. 469, 476 17
Drake Standard Machine Works v. Brossman, 135 Ill. App. 209, 222 19
Grand Rapids, etc. R. Co. v. Huntley, 38 Mich. 537 19
Hepp v. Quickel Auto Co., 37 N. M. 525, 25 P. (2d) 197, 199, 200 9
Herricks v. C. & E. I. R. Co., 257 Ill. 264 19
Inland, etc. Co. v. Tolson, 139 U. S. 551 13
Kraus v. Becker, Ryan & Co., 265 Ill. App. 525, 533 7
Leideck v. City of Chicago, 248 Ill. App. 545, 558 12
Losee v. Buchanan, 51 N. Y. 476 20
Martin v. Studebaker, 102 N. J. L. 612, 133 Atl. 384 20
Masten v. Cousins, 216 Ill. App. 268 ..... 5, 7
Memphis Street Railway Co. v. Stockton, 143 Tenn. 201, 226 S. W. 187 9
Mooney v. Beattie, 180 Mass. 451, 62 N. E. 725 20

North Memphis Savings Bank v. Union Bridge, etc. Co., 138 Tenn. 161, 196 S. W. 492, 496 9
O'Hara v. Brown Hoisting Co., 171 Fed. 394 (3 C. C. A.) 19
O'Rourke v. Marshall Field & Co., 307 Ill. 197 4
Patton v. Texas & Pacific R. Co., 179 U. S. 658, 663 19
Plumb v. Richmond Light & R. Co., 233 N. Y. 285, 135 N. E. 504, 505 9
Reynolds v. Merchants Woolen Co., 168 Mass. 501, 47 N. E. 406 20
St. Paul F. & M. Ins. Co. v. Bachmann, 285 U. S. 112 ... 16
Shea v. Wellington, 163 Mass. 364, 40 N. E. 173 20
Siegel v. Detroit, etc. R. Co., 160 Mich. 270, 125 N. W. 6 20
So. Bell Telephone Co. v. Clawson, 13 Ga. App. 520, 79 S. E. 488 19
Sprinkle v. Davis, 104 F. (2d) 487, 490 17
Sweeney v. Erving, 228 U. S. 233 15
U. S. v. Delaware, etc. R. Co., 218 F. 608, 610 (2 C. C. A.) 17
U. S., ex rel. Smith v. Stewart, 2 F. (2d) 936, 937 (Ct. App. D. C.) 17

Digests.

22 A. L. R. 1471 9

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I.

Statement of Case.

Respondents' criticisms of petitioner's statement of the case are generally differences in construction of the record and most of them are of no consequence on the question of whether certiorari should be granted. However, several of respondents' statements are inaccurate.

Respondents incorrectly accuse petitioner (p. 2*) of taking a different position in its petition than in its brief

*NOTE: Pages refer to respondents' brief, unless otherwise noted.

in the Circuit Court of Appeals with respect to the cause of the failure of respondents' drawbridge to rise. The statement from petitioner's earlier brief quoted by the Circuit Court of Appeals (R. 844) and requoted by respondents (p. 2) is entirely consistent with the statement in the petition. Petitioner has tried, in the Circuit Court of Appeals and in the petition, to draw a distinction between proof on the one hand of the physical or mechanical cause of an accident and proof on the other hand of the human conduct, which alone is the criterion of negligence, producing the physical cause.

Respondents seek (pp. 3-4) to give the impression that petitioner misled the trial court as to its reliance on the rule of *res ipsa loquitur*. The trial judge was not misled on this point. While petitioner's counsel told the trial court (R. 371) that the term "*res ipsa loquitur*" had not been used in bridge cases, he stated in full the basic principles of that rule, asserted petitioner's reliance on these principles, and stated that he did not think the name had any magic (R. 371). When the requests for instructions were discussed by the trial judge and counsel, the trial judge, in referring to petitioner's requested instruction No. VII, said, "Of course, this instruction is designed to invoke the rule of *res ipsa loquitur*," (R. 598), and the colloquy on that page of the Record shows that petitioner was contending then, as now, that it was entitled to rely on *res ipsa loquitur* until respondents showed why the cotter key was missing.

Respondents' statement (p. 4) that the failure of the bridge to open promptly was immaterial because the fireboat could not have arrived before 3:51 p. m. and that at that time the fire had already spread to petitioner's plant, is based upon testimony that the photographs, defendants' Exhibits P, R and S, were taken between 4:01 and 4:06 p. m. Respondents, however, neglected to state that the

time at which these photographs were taken was disputed and is strongly contradicted by the large group of witnesses referred to in the second paragraph of the footnote on page 4 of their brief. Ten firemen testified that the fireboat could have prevented the fire spreading to plaintiff's plant if it had arrived before the wooden pens caught fire (R. 76, 92, 96-7, 173, 178, 181-2, 188-9, 229, 245 and 274) by keeping the wooden pens wetted down (R. 76, 174, and 96), by laying down a curtain of water between the burning elevator and the pens (R. 83, 96 and 174), or by knocking down the wooden pens with the streams from its turret nozzles (R. 76, 83). Three others testified that the fireboat would have been ineffective to prevent the spread of the fire (R. 442-3, 470, 508-9).

Another of respondents' criticisms is misleading. They say (p. 5) that it is not true that there is no evidence in the entire Record that the missing cotter key, or broken fragments of it, were found when the lever box was opened or immediately thereafter. They quote the testimony of Chichocki (R. 165) that he saw a cotter key on the desk in the custody of Mr. Preston, after the bridge failed to rise. But respondents failed to inform the Court that, on cross-examination, Chichocki stated that he did not know where Mr. Preston got the cotter key (R. 170), and that respondents' counsel took the position that there was no evidence that this cotter key had ever been in the bridge control device (R. 598). We reiterate that there is no evidence in the record as to the cotter key which was missing from the control device.

However, these matters go more to the merits of the case than to the question of whether the opinion of the Circuit Court of Appeals is such that this Court should grant a writ of certiorari.

II.

The Question Before This Court at This Time.

The question now before this Court is whether it should grant certiorari because the Circuit Court of Appeals erroneously applied the local and federal law to certain points in this case. Respondents' "Opposition to Petition for Certiorari" is the sort of argument that would be appropriate if this Court had granted the petition for certiorari and was hearing the case on its merits. Their approach to the petition is typified by the intimation (p. 2) that "the grounds of the Court of Appeals holding are of course immaterial, if its decision was correct," and by the statement (p. 5) that the only question before this Court is whether the trial court committed reversible error when it refused to give the "broad and general *res ipsa loquitur* instruction tendered by the petitioner." Respondents constantly endeavor to lead the discussion away from the Appellate Court's opinion, the errors in which are the basis for the allowance of the writ of certiorari in this case, and to discuss the merits, which petitioner believes cannot fairly be done within the limitations imposed on petitions for certiorari.

III.

The Illinois Law as to the Applicability of the Doctrine of Res Ipsa Loquitur.

Respondents' statement (pp. 7-9) as to what evidence under Illinois law will deprive a plaintiff of the right to rely on the doctrine of *res ipsa loquitur*, is based on dicta in *Bollenbach* v. *Bloomenthal*, 341 Ill. 539 (holding that *res ipsa loquitur* does not apply to a malpractice case), and in *O'Rourke* v. *Marshall Field & Co.*, 307 Ill. 197 (affirming a

judgment for a plaintiff who alleged and proved specific negligence and certain Illinois Appellate Court decisions. Respondents did not discuss or attempt to distinguish the cases relied on by petitioner (Pet., p. 14), namely, *Chicago City Railway Co.* v. *Carroll*, 206 Ill. 318, and *Chicago City Railway Company* v. *Barker*, 209 Ill. 321, which we believe are the only square decisions in the Illinois Supreme Court on this point, and *Masten* v. *Cousins*, 216 Ill. App. 268.

In the *Carroll* case a passenger in one of defendant's street cars obtained a transfer and alighted from one car for the purpose of changing cars. While walking beside the car from which he had just alighted, the trolley pole fell from that car, striking and injuring him. It should be noted that the precise physical cause of the accident was shown, namely, the fall of the trolley pole onto the plaintiff's head. What was not clearly shown was whether the fall of the trolley pole was due to some negligent act on the part of defendant. In disposing of the argument that there was no evidence showing specific negligence, the Supreme Court of Illinois said (206 Ill. at p. 324):

> "*Appellant contends* that as certain counts in the declaration alleged that the car was not properly inspected, and that other counts alleged that the bolts and connections of the trolley-pole were rusty and worn, *these were specific charges of negligence and there was no proof in the record to support them.* Appellant, in its argument, seems to overlook the fact that the declaration contained six counts, and that in at least three of them there was no specific negligence charged. *But if its contention was sound, as we think it is not*, as applied to the counts charging specific negligence, it could not be applied to the counts charging general negligence. Touching this same objection, which was made in the *Cotton case, supra*, this court said (p. 495): 'But it seems to be contended that, even admitting that a presumption of negligence arises from mere proof of the plaintiff's injury and its cause, it does not follow that there is

any presumption of the specific negligence alleged in the declaration. Even if it be admitted that the presumption is one of negligence generally, and not of any specific negligence, we think it sufficient to throw upon the defendant the burden of rebutting the specific negligence alleged. But the circumstances of the injury do, in our opinion, give presumptive evidence of at least the specific negligence charged in the first count of the declaration. That charge, as we have seen, is very general, and consists of negligently running and operating its road and the cars propelled thereon.' The *first* count of the declaration charges that appellant 'so carelessly and negligently propelled and managed said car and trolley-pole that said trolley-pole broke away from said car and fell and hit plaintiff upon the head.' The *fifth* count charges that appellant 'so carelessly and negligently managed and operated said Wentworth avenue car, and trolley-pole attached thereto, that said trolley-pole fell and hit plaintiff upon the head.' The *sixth* or additional count charges that appellant 'carelessly permitted plaintiff to be hit upon the head by said trolley-pole.' Applying the rule as announced in the above case, and as we think it is generally recognized, there can be no doubt but that the evidence in behalf of appellee was sufficient to cast upon appellant the burden of rebutting the negligence alleged in these counts." (Italics ours.)

A careful analysis of the italicized language of the court in the above quotation will show that when the court said, "But if its contention was sound, as we think it is not, as applied to the counts charging specific negligence * * *" the court can only mean that there was some evidence to support the counts charging specific negligence. When the court then says that this contention could not be applied to the counts charging general negligence, the court must mean first, that it believed the evidence would have justified a finding for the plaintiff on the counts charging specific negligence, and second, that even if the evidence was not sufficient to prove specific negligence, the attempt

to do so did not prevent plaintiff from relying upon the rule of *res ipsa loquitur* as to the counts charging general negligence. In short, the *Carroll* case is a decision by the Supreme Court of Illinois that the attempt to prove specific negligence does not, in and of itself, deprive a plaintiff of the right to rely upon the rule of *res ipsa loquitur*.

To the same effect is the case of *Masten* v. *Cousins*, 216 Ill. App. 268, in which it was held that there was evidence to go to the jury on the doctrine of *res ipsa loquitur* and also upon a charge of specific negligence. The foregoing decisions, together with the *Barker* case (discussed *infra*, p. 14), establish the law of Illinois at variance with the opinion of the Circuit Court of Appeals in this case.

Respondents then contend (p. 9) that if the mere introduction of such detailed and undisputed evidence as the absence of the cotter key was not sufficient to eliminate the doctrine, "it is still true that negligence of defendants was not the more probable conclusion from all the evidence, and the doctrine therefore had no application."

On principle, this should not be the law, as shown on pages 21-22 of petitioner's original brief. The Illinois cases cited by respondents (p. 10) are not in point. *Chicago & E. I. Railroad Co.* v. *Reilly*, 212 Ill. 506 was not a *res ipsa loquitur* case, but one involving a measure of proof by circumstantial evidence, and cites in support of its rule cases (*Lewis* v. *Flint, etc., R. Co.*, 54 Mich. 55, *Mitchell* v. *Chicago, etc., R. Co.*, 51 Mich. 236) from one of the two jurisdictions (Michigan and South Carolina) which do not recognize the rule of *res ipsa loquitur*.

In *Kraus* v. *Becker, Ryan & Co.*, 265 Ill. App. 525, the doctrine of *res ipsa loquitur* was inapplicable, for the reason which Judge Friend pointed out, viz., that there was no showing of the physical cause of plaintiff's injury. The language in that opinion upon which respondents un-

doubtedly rely does not refer to the inference of negligence under *res ipsa loquitur*, but to the inference as to the physical cause of the injury. This is made clear by the following quotation (265 Ill. App. 533):

> "In well considered cases resting upon the application of the doctrine of *res ipsa loquitur*, as tending to establish prima facie evidence, and where liability was upheld, it will be invariably found *that in every instance there was an essential element present, that is proof of the existence of the cause or thing which was alleged to have been the negligent act which produced the injury*, or proof of such facts from which the existence of such cause or thing constituting the alleged negligent act was the only reasonable inference that could be properly drawn." (Italics ours.)

That the *Kraus* case turned on the absence of sufficient proof of the instrumentality which was the physical cause of the injury is confirmed by the discussion in the *Kraus* case of *Benedick* v. *Potts*, 58 Md. 52. In the *Potts* case, plaintiff, a passenger on defendant's roller-coaster, was found unconscious in one of defendant's tunnels. There was no evidence of the agency causing the injury. The Maryland Court refused to apply *res ipsa loquitur*, and as quoted by Judge Friend (265 Ill. App. at 533), said:

> "It (*res ipsa loquitur*) permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury."

It is clear that when the Court in the *Kraus* case is talking about the most reasonable inference, it is talking about the sufficiency of circumstantial evidence to prove the physical cause of the injury—an entirely different thing from *res ipsa loquitur*.

Beckwith v. *Boynton*, 235 Ill. App. 469, does not support respondents' contention (p. 9) that "negligence of defendant must be the more probable conclusion from all the facts in evidence, otherwise the doctrine of *res ipsa loquitur*

does not apply." That was a malpractice case, and the court refused to apply the doctrine of *res ipsa loquitur*, because the thing causing the injury was not shown to be under the defendant's control (235 Ill. App. at 481-483). So the court in that case was applying the test of the sufficiency of evidence under the law relating to circumstantial evidence, not *res ipsa loquitur*.

Respondents' entire argument on this point is fallacious because it fails to recognize the difference between *res ipsa loquitur*, on the one hand, and proof by circumstantial evidence on the other. Many courts have been confused on this point. The difference is forcefully expressed in a note in 22 A. L. R., p. 1471, as follows:

> "* * * *the lack of evidence*, direct or circumstantial, *indicating negligence* on the part *of the defendant as the responsible human cause of the particular accident* in question, *is* not only *not fatal to the applicability of the rule of res ipsa loquitur* in its strict and distinctive sense, as *distinguished from* the principle, with which it is often confused, that *negligence* may be *established by circumstantial evidence*, but furnishes the occasion and necessity for invoking the rule in that sense." (Italics ours.)

This distinction has been adverted to in

Plumb v. *Richmond Light & R. Co.*, 233 N. Y. 285, 135 N. E. 504, 505.

Hepp v. *Quickel Auto Co.*, 37 N. M. 525, 25 P. (2d) 197, 199, 200.

North Memphis Savings Bank v. *Union Bridge, etc. Co.*, 138 Tenn. 161, 196 S. W. 492, 496.

Memphis Street Railway Co. v. *Stockton*, 143 Tenn. 201, 226 S. W. 187.

The opinion of the Circuit Court of Appeals in this case depends on and perpetuates this very fallacy, and this fact furnishes a strong reason for the granting of certiorari to correct this error.

The other cases cited by respondents (p. 10) are not Illinois cases, and, of course, do not state the law of Illinois which is applicable to this case, so far as the substantive law is concerned.

Respondents then take the position that if a latent defect was the cause of the cotter key being missing (entirely an assumption on the part of respondents), then respondents would not be liable, and they cite (pp. 12-13) but do not discuss, twelve cases in support of this proposition, none of which are in point. All may be distinguished for the reasons set out in Appendix A, attached to this brief.

Respondents then refer to *Buckland* v. *N. Y. N. H. & H. R. Co.*, 181 Mass. 3, as being the case "closest on the facts" (p. 13) to the case at bar. That case, however, is to be distinguished from the case at bar, first, because there was proof that the failure was due to a break in the vital pin, whereas, in the instant case, the pin was only shown to have been missing and its absence was not explained; and second, the break in the pin was due to a hidden defect which could not have been discovered by inspection, whereas, in the case at bar, assuming a break in the cotter key, there was no showing what the nature of the break was, or whether the defect was such that it could not have been discovered on inspection. On the other hand, the recent case of *Churchill* v. *Baltimore & Ohio R. Co.*, 30 F. Supp. 792, is directly in point. In that case the evidence showed that the rigging underneath a railroad car had fallen, due to the absence of a cotter key, and the court there held that merely to show that the cotter key is missing, is not sufficiently specific proof to prevent the application of the doctrine of *res ipsa loquitur*.

IV.

Petitioner's Requested Instruction No. VII Was Not Erroneous in the Respects Stated by Respondents.

(1) Respondents criticize (p. 15) petitioner's requested Instruction No. VII as not including all the credible undisputed evidence. But the requested instruction was not a binding or mandatory one directing a verdict if the jury found certain facts. Such an instruction, of course, must include the credible and undisputed evidence, but in this case the requested instruction merely undertook to tell the jury what facts would justify (not compel) an inference of negligence unless upon the whole evidence such prima facie evidence is rebutted (R. 536). It did not authorize the jury to ignore any credible evidence. It was clearly applicable under the words of the complaint which asserted negligence in general terms, where, as here, the responsible human cause, as contrasted with the physical or mechanical cause of the failure of the bridge to rise was not shown.

An Illinois case answering respondents' criticisms in this respect is *Chicago Union Traction Co.* v. *Newmiller*, 215 Ill. 383. There the evidence showed that the plaintiff was a passenger upon an electric street car, eastbound; that it was a long, closed car with seats running lengthwise; that the plaintiff sat at the extreme rear end of the left hand side; that there were a number of other passengers in the car; that the controller of the car was located on the front platform, close to the dash-board; that while running at the rate of six or seven miles an hour there was a sudden flash and noise from the controller, and flames shot out of it to a height of five or six feet; that there was a loud explosion; that the passengers, including the plaintiff, rushed toward the rear platform and the plaintiff was pushed off and fell to the pavement, injuring her. *Although*

the evidence localized the cause of the trouble in the controller of the street car, the Court did not, in its instructions, confine possible inferences of negligence to those in connection with the controller, but allowed a general inference of negligence on the part of the defendant from the mere fact of the explosion and the ensuing panic in the car. The Court's instruction on this point was as follows (215 Ill. at 388):

> "'The court instructs the jury that if you believe and find, from the evidence, that the plaintiff was a passenger on one of defendant's cars, and while such passenger she was in the exercise of ordinary care for her own safety, an explosion occurred on said car, by reason of which a panic was caused among the passengers in said car, in consequence of which the plaintiff, without fault on her part, was pushed from said car and thereby injured, then the plaintiff has made out a *prima facie* case of negligence against the defendant, and this places upon the defendant the burden of rebutting that presumption by proving that the explosion could not have been prevented by all that human care, vigilance and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road.'"

There was a verdict and judgment for the plaintiff. On appeal the judgment was affirmed, and the above instruction approved.

(2) The use of the words "prima facie" is relied on (p. 16) as a justification for the refusal of the requested instruction, and three Illinois cases are cited by respondents to uphold this criticism, but a Federal judge in giving instructions is not bound by a state court's ideas of terminology or diction. This is especially true where the same state court has not only criticized, but approved. the term "prima facie." In the case of *Leideck* v. *City of Chicago*, 248 Ill. App. 545, 558, the Illinois Appellate Court held that the words prima facie have been a part of the English language for 500 years.

And regardless of the criticisms of the use of the words "prima facie" by the Illinois Supreme Court in criminal cases, it has approved the use of such words in tort cases. Thus in *Chicago & Alton R. R. Co.* v. *Esten,* 178 Ill. 192, 198, the Supreme Court of Illinois says:

> "The court gave an instruction asked by the plaintiff which followed the statute, and informed the jury that if they believed, from the evidence, the fire was communicated from the locomotive engines used by defendant upon its railroad, that fact should be taken by them as full *prima facie* evidence to charge the defendant with negligence. The instruction was substantially the one given in *Louisville, Evansville and St. Louis Consolidated Railroad Co.* v. *Spencer,* 149 Ill. 97, and the objection made is, that the term '*prima facie*' should have been so modified and explained that the average juror would comprehend and understand what was meant by it. In the case cited the instruction was held to be proper, and it was said that if, in the opinion of counsel for defendant, there was danger that its meaning might be misapprehended they should have offered an instruction for that purpose, which would undoubtedly have been given. In the first instruction given for the plaintiff in this case the subject is referred to, and it was conceded by that instruction that the defendant might overcome the *prima facie* case made by the proof of setting the fire. Webster's dictionary contains the term as English, and it is probably as well understood as a large share of the words and terms used, so that it cannot be said to be the introduction of a foreign language into an instruction."

And in the instruction approved in *Inland etc. Co.* v. *Tolson,* 139 U. S. 551, of which petitioner's requested instruction is a paraphrase, the words "prima facie" appear twice.

(3) Respondents next contend (p. 16) that "under the law of Illinois it is error to instruct the jury on what constitutes a prima facie case after contrary evidence has been introduced," and they cite *Bollenbach* v. *Bloom-*

enthal, 341 Ill. 539, and certain Illinois Appellate Court cases, most of which involve the liability of bailees. But the *Bollenbach* case holds (341 Ill. at 544-546) that *res ipsa loquitur* is not applicable in a suit against a dentist for malpractice, and so, of course, no *res ipsa loquitur* instruction should have been given. The Illinois law on the effect of an attempted explanation of a prima facie case is found in *Chicago City Ry. Co.* v. *Barker,* 209 Ill. 321. In that case a motorman on defendant's sand car fell off and the car, out of control, struck the wagon driven by plaintiff's intestate. The defendant made an unusual case and vigorously attempted exculpation from the prima facie case created by the doctrine of *res ipsa loquitur.* In discussing the legal effect of this effort the Supreme Court of Illinois said (209 Ill. at 327-328):

> "It was for the jury to say, whether the motorman fell from the car on account of an electric shock, which, he says, he received, or whether he fell off, as the result of his own conduct in looking back over the barrel without securing a sufficient hold upon some part of the car to prevent himself from falling off. Whether his statement was true, that an electric shock was the cause of his fall, was a matter to be determined by the jury. *The testimony, introduced by the appellant, was to the effect that there was no way, in which the electric apparatus could cause such a shock; that no person had ever heard of such an accident before; that the witness had run the car for three weeks, and during all the morning of that day without any accident, the accident having occurred about one o'clock; that the car was of the best and highest standard of construction; that it was inspected by expert workmen every night, and that any repairs, which were needed, were promptly made.*
>
> "The contention of the appellant is that, if it was necessary for it to rebut the *prima facie* presumption of negligence raised by the occurrence of the accident in the manner stated, it did so by showing that the motorman was thrown from the car by an electric

> shock, which the appellant was unable to anticipate or prevent, and that, therefore, it should not be held responsible, because the car was not in the control of anyone when it struck Eick's wagon. It was a question for the jury to determine, whether the explanation of the accident sufficiently rebutted the presumption in question. *The credibility of such rebutting evidence is held by the authorities to be a question for the jury.*" (Italics ours.)

And later in the same case the Court said (209 Ill. at 329):

> "As is said by the Appellate Court in their opinion deciding this case: 'in the case at bar, it was for the jury to consider whether the explanation offered by appellant relieved it from the presumption of negligence raised by the undisputed facts.'"

The above sentence must mean that the inference of negligence created by the rule of *res ipsa loquitur* may persist in spite of defendant's attempted explanation, and so, of course, the jury must be told of this inference. How could a jury consider the question stated by the Supreme Court of Illinois in the above quotation, unless it is informed by the judge's instructions as to the effect of plaintiff's prima facie case under the doctrine of *res ipsa loquitur*, as in the *Newmiller* case (215 Ill. 383)?

Other cases have been cited in plaintiff's petition (Pet., pp. 15-16) to the effect that where the facts of the case created an inference under the doctrine of *res ipsa loquitur*, the jury must be told this, so that the jury may see the facts against the defendant's attempted explanation.

(4) Petitioner's requested instruction No. VII imposed no excessive burden on the respondents. It laid down no standard differing from that imposed by *Sweeney* v. *Erving*, 228 U. S. 233. It simply told the jury that they might find negligence from certain facts constituting a prima facie case, unless on the whole evidence the prima facie evidence was rebutted, and this is the essence of the decision in *Sweeney* v. *Erving, supra*. Moreover, *Sweeney*

v. *Erving* cites (228 U. S. at 240) and relies on *Inland etc. Co.* v. *Tolson,* 139 U. S. 551, from which petitioner's requested instruction No. VII was paraphrased. If the instruction in the *Tolson* case had imposed too heavy a burden on the defendant, the Supreme Court would not have relied upon that decision in the *Sweeney* case.

V.

The Trial Court's Duty to Correct a Defective Instruction.

Respondents have denied that the case of *St. Paul F. & M. Ins. Co.* v. *Bachmann,* 285 U. S. 112, supports petitioner's contention that the trial court should have given some instruction on the subject of *res ipsa loquitur,* even though plaintiff's requested Instruction No. VII might have been defective in form. Respondents misinterpret the holding of that case when they say (pp. 19-20) that this Court at no point, directly or indirectly, indicated there was any burden on the trial court to independently prepare instructions for the defendant.

The fact is that that case was a suit on a fire insurance policy which contained a warranty against increase of risk (referred to as the "Increase of Hazard Warranty"), and a warranty against keeping gasoline on the premises (referred to as the "Prohibited Articles Warranty"). The evidence showed that a large amount of gasoline was kept on the premises in connection with a still run by plaintiff's tenant. The defendant submitted requests for instructions as to the Prohibited Articles Warranty, which were technically erroneous and were refused by the trial court. The trial court submitted the case to the jury without any instruction relating to the Prohibited Articles Warranty. A verdict for plaintiff was affirmed by the Circuit Court of Appeals, and on certiorari the Supreme

Court reversed the case. Mr. Justice Brandeis, speaking for the whole court, said, at 285 U. S. 118-119:

> "These instructions, while correct insofar as they bore upon the defense under the Increase of Hazard Warranty, were erroneous in respect to that under the Prohibited Articles Warranty. The fact that the defendant had incorporated errors of law in the instructions which it sought upon the second defense did not justify putting the case to the jury solely upon the first. Compare *Westchester Fire Ins. Co.* v. *Fitzpatrick*, (C. C. A. 6th) 2 F. (2d) 651, 654; *Sutherland* v. *Payne*, (C. C. A. 6th) 274 Fed. 360, 361; *Rothe* v. *Pennsylvania Co.*, 114 C. C. A. 627; 195 Fed. 21, 25; *Audubon Bldg. Co.* v. *F. M. Andrews & Co.*, 111 C. C. A. 92, 187 Fed. 254, 260."

These cases cited by the Supreme Court establish that when an instruction, though technically incorrect, is "sufficient to direct the mind of the judge to the legal principle" (*Sprinkle* v. *Davis*, 104 F. (2d) 487, 490) and no other instruction with respect to that legal principle is submitted, the trial court is required to give a correct instruction with respect thereto.

VI.

Conclusion.

Respondents argue (p. 20) to this Court that "The jury found for the respondents." But this Court and all Federal courts have recognized that the conclusive effect of a verdict is conditional on the correctness of the instructions under which the verdict is returned.

Delaware etc. R. Co. v. *Converse*, 139 U. S. 469, 476.

U. S. ex rel. Smith v. *Stewart*, 2 F. (2d) 936, 937, (Ct. App. D. C.).

U. S. v. *Delaware etc. R. Co.*, 218 F. 608, 610 (2 C. C. A.).

If petitioner's requested instruction No. VII should have been given, the fact that the jury returned a verdict against petitioner based on insufficient instructions, should not influence this Court.

We urge the Court to issue its writ of certiorari in this case to clear up the procedural confusion in the application of the rule of *res ipsa loquitur* which the opinion of the Circuit Court of Appeals in this case has only increased.

Respectfully submitted,

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